

are important. Again, I thank you for your courtesies and your fairness in keeping them going.

Chairman SPECTER. Thank you very much, Senator Leahy.

We now turn to our first witness on our next panel, Professor Nora Demleitner, from the Hofstra School of Law. She teaches and has written widely on criminal, comparative and immigration law; Managing Editor of the Federal Sentencing Reporter, and serves on the executive editorial board of the American Journal of Comparative Law; a Bates graduate, summa cum laude, and a graduate from the Yale Law School in 1992—we have a heavy representation of Yale Law graduates here; that is a very healthy thing—and was Symposium Editor of the Yale Law Journal. I didn't know there was a Symposium Editor. There wasn't one there in my time.

Thank you for joining us, Professor, and the floor is yours.

STATEMENT OF NORA V. DEMLEITNER, VICE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW, HOFSTRA UNIVERSITY SCHOOL OF LAW, HEMPSTEAD, NEW YORK

Ms. DEMLEITNER. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. Good morning, and thank you for the opportunity to testify today. The one thing I should—

Chairman SPECTER. I should have added, Professor, that you clerked for Judge Alito after graduating from law school. I think that ought to be on the record.

Start the clock back at 5 minutes.

Ms. DEMLEITNER. I was about to add that. Thank you very much.

Now, since the very early days of my clerkship, I must admit that Judge Alito has really become my role model. I do think that he is one of the most brilliant legal minds of our generation, or of his generation, and he is a man of great decency, integrity and character. And I say all of this as what I would consider to be a left-leaning Democrat; a woman, obviously; a member of the ACLU; and an immigrant.

And my view is not one that is unique with regard to people who have worked with him or with regard to people who have worked for Judge Alito. Now, all of his clerks, many of whom are politically liberal, have signed on to a letter strongly urging the Senate to confirm Judge Alito as Associate Justice. A number of non-Republican legal academics who have worked with or for Judge Alito have also issued an equally forceful statement on his behalf.

Let me explain to you why I believe that Samuel Alito deserves to sit on the highest Court and why his confirmation will, in fact, not pose a threat to the rights of women, to the rights of minorities, immigrants, or other vulnerable groups.

Now, Judge Alito does not have a political agenda. He gives very careful consideration to the lower court record and to prior judicial decisions. Now, let me point you to two cases that may explain the judge's philosophy.

While I clerked for him, he had to decide the case of Parastoo Fatin. Ms. Fatin had left Iran in part to be escaping the regime of Ayatollah Khomeini. She applied for asylum in the United States, but was denied by the immigration court and by the Board of Immigration Appeals.

Now, without revealing any confidences, I can tell you that Judge Alito was very much moved by the personal tragedy of the situation and the moral dilemma Ms. Fatin would face. If returned to Iran, she would either be unable to speak her deep feminist convictions or the Iranian regime would penalize her.

Now, the problem with her case was that there was really an absence of favorable case law and, even worse, a very thin record that indicates only very limited opposition on her part to the Iranian regime.

Now, the judge did not see himself in a position to help Ms. Fatin, who was, however, ultimately permitted to stay in the United States. He, however, did take this opportunity to write one of the most progressive opinions on gender-based asylum. Now, his decision was the first to recognize that gender alone could constitute a basis for asylum. This revolution in asylum law has not been widely recognized outside a very small group of asylum practitioners, and neither has Judge Alito gotten a whole lot of credit for garnering the votes of both of his fellow panelists for this decision, one of whom was a Nixon appointee.

Now, the Fatin case hasn't gotten a lot of attention, but you have spent part of the day yesterday on the *Rybar* case, where Judge Alito dissented. Now, I think you should read the case a little differently than the way in which it has been portrayed. Now, let me just set the context.

In 1995, the Supreme Court decided *Lopez*, Justice O'Connor joining the majority striking down the possession of machine guns on school grounds as unconstitutional. Now, I think a lot of commentators expected this to create a major shift in lower court jurisprudence. This did not happen, I think, in part because the lower courts read the decision extremely narrowly and arguably incorrectly.

Now, Judge Alito, who has been, I think, generally labeled as an anti-criminal defendant judge, was very much willing to follow Supreme Court precedent to the point where it would necessitate the dismissal of a host of criminal indictments. At the same time, he took pains to note that Congress could very easily remedy the problem with the statute by indicating in the record that there was a connection between the possession of machine guns and interstate commerce. Now, let me also point you to the fact that a blue ribbon ABA task force has increasingly critiqued the increasing Federalization of criminal law.

Now, Judge Alito's record, I think, indicates, and *Rybar* confirms, that he will follow Supreme Court cases very carefully, and that he will read congressional legislation very carefully. He has also used, I think, his prior background experience very effectively in working, for example, on sentencing reform with the Constitution Project and at one point as an advisory board member of the Federal Sentencing Reporter.

I believe overall that his criminal background experience will inform the judge's decision, but it will surely not bias him in one way or the other. He will be able to strike a practical balance that is informed, but not predetermined by his background.

And for all those reasons, I believe very strongly that he deserves to be confirmed as the Court's next Associate Justice.

[The prepared statement of Ms. Demleitner appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor.

We now turn to Professor Erwin Chemerinsky, the Alston & Bird Professor of Law and Political Science at Duke. Prior to coming to Duke in 2004, he had been for 21 years at the University of Southern California Law School, where he was the Irmas Professor of Public Interest Law. He is a graduate of Northwestern University with a bachelor's degree, and a law degree from Harvard. Last year, he was named by Legal Affairs as one of the top 20 legal thinkers in America.

Thank you for coming in today, Professor, and the floor is yours.

STATEMENT OF ERWIN CHEMEKINSKY, ALSTON & BIRD PROFESSOR OF LAW AND POLITICAL SCIENCE, DUKE UNIVERSITY LAW SCHOOL, DURHAM, NORTH CAROLINA

Mr. CHEMEKINSKY. Thank you, Mr. Chairman, Senator Leahy, distinguished Senators. It is truly an honor and a privilege to testify at these historic hearings.

It is impossible to overstate the importance of this nomination to the future of constitutional law. In recent years, the Supreme Court was often referred to as the O'Connor Court because Sandra Day O'Connor so often has been in the majority in 5–4 decisions in crucial areas: protecting reproductive freedom, enforcing the separation of church and state, limiting Presidential power, and advancing racial justice. Replacing her has the possibility of dramatic changes in so many areas of constitutional law.

A crucial question for this Committee is what will be the effect of Samuel Alito on the Supreme Court. I want to focus on one area, Executive power. I choose this area because no area of constitutional law is likely to be more important in years ahead than this.

As you know, in recent years the Bush administration has made unprecedented claims of expansive Presidential power, such as the claim of authority to detain American citizens as enemy combatants without meeting the Constitution's requirements for warrant, grand jury, or trial by jury; the claim of authority to torture human beings, in violation of international law; the claim of authority to eavesdrop on conversations of Americans without complying with the Fourth Amendment or the Foreign Intelligence Surveillance Act; the claim of authority to hold American citizens indefinitely and citizens of other countries indefinitely as enemy combatants.

Now, my goal here isn't to discuss the merits of any of these issues; instead, to point to the fact that separation of powers is likely to be an enormously important issue in the years ahead. And, of course, there is no need to remind this body of the crucial role that checks and balances and separation of powers play in our constitutional structure.

Some of the most important Supreme Court cases in history have been those where the Court has said no to assertions of Presidential power, such as in *Youngstown Sheet and Tube v. Sawyer* in striking down President Truman's seizure of the steel mills, and *United States v. Nixon* in saying that President Nixon had to reveal the Watergate tapes.